CORRESPONDENCE.

Collateral Evidence.

Editor, Virginia Law Register:

My attention was recently sharply called to the question of collateral evidence by a criminal case in our court, in which the case of the Norfolk & W. R. Co. *v.* Carr, 106 Va. 508, was cited.

I was not satisfied with the opinion of the court in that cause and determined that I would at the first opportunity that presented itself to me, make an investigation into the matter. I have done so, and have come to the conclusion that no more erroneous decision was ever rendered by any court, nor one that was more likely to interfere with the proper cross-examination of a corrupt witness.

In order that I may make myself clear, I will quote from so much of the decision as relates to the question of collateral evidence:

"We are further of the opinion that the circuit court did not err in sustaining the objection taken by the plaintiff to certain questions asked his witness, William Carr, on cross-examination, and certain questions asked the defendant's witness, Mary Bray.

"William Carr, though the next friend of the real plaintiff, Willie Carr, was merely a witness in the case. The question asked him on cross-examination was 'Did you tell Mary Bray that, if she would testify for you to-day, you would see that she was paid? After witness had denied that he made the statement, further questioning along the same line was objected to, and the objection sustained. This evidence was collateral to the issue, and calculated to divert the jury from the case before them."

So that, as a matter of fact, the court decided, that a next friend, and one who was evidently conducting the case, and who was a witness in the case, could not be asked if he had not tried to bribe a witness to swear falsely in that case, and if the witness had collected.

Now, the question is, "Is that a correct exposition of the law?" And if it is law, is it common sense. My contention is, that it is not law, and if it is, it is the height of absurdity, and should be changed by the Legislature as soon as possible.

I find that there have been three cases in Virginia in which this matter of collateral evidence has been discussed—the case under discussion, Langhorne's Case, 76 Va. 1012, and Southern R. Co. *v.* Blandford, 105 Va. 373.

It strikes me that a mistaken dictum in Langhorne's case, and one that had nothing to do with the case at issue, has been the cause of the error into which the court has fallen. In Langhorne's case, which was a criminal one, the accused was being tried for burning a tobacco factory. A witness, Edward Penn, was being cross examined, and was asked this question: "During your confinement in cell with prisoner, have you not had a transaction of a money and property character

with him, and have you not been sued by the prisoner within the last week?"

The court properly held that that was collateral evidence, but in rendering their opinion, it quoted Wharton on the Law of Evidence as follows: "This is a settled rule of practice, in order to avoid interminable multiplication of issues, and the test whether the fact inquired of is collateral, is this, would the cross-examining party be entitled to prove it as part of his case, tending to establish his plea."

In my opinion it is this erroneous definition of collateral evidence that has caused the error in the case under discussion.

In the case of Moore *v.* City of Richmond, 85 Va. 538, is found a far better definition. The court there says, page 539: "It is an elementary rule that the evidence must be confined to the point in issue, and hence evidence of collateral facts, from which no fair inferences can be drawn, tending to throw light upon the fact under investigation, is excluded." In that case, which was a suit against the City of Richmond for injuries to the plaintiff sustained by falling into a hole in the street, it was sought to be shown that some one else, had fallen into the same hole. The court properly held it could not be done.

The question was fully discussed in the case of Southern R. Co. *v.* Blandford, above referred to. In that case the court quotes freely from Wigmore on Evidence, and that case was also, it seems to me, correctly decided.

Now as the court has quoted Wigmore as an authority, I want to show by the very same authority, that it fell into error in the case under discussion.

Wigmore, in § 1004, says, facts are not collateral, which are relevant to some issue in the case, or relevant to the discrediting of a witness. And in § 956, in enumerating the various facts that discredit a witness, he lists as number 4, "The attempt to bribe another witness." And § 960 is as follows: "The witness' attempt to bribe another witness to speak falsely or to abscond indicates for the case in hand a corrupt intention on the first witness' part, and thus affects his trustworthiness."

It will thus be seen that the test laid down by the court in Langhorne's case, following Wharton on Evidence is too narrow. The test should be, is the evidence relevant to the cause at issue, or is it relevant to the discrediting a witness in the cause? This is the law as it is set out by Prof. Wigmore, and it is common sense. The object of all rules of evidence is to get the truth in the case at issue, and not to confuse that case with other cases.

Now, in the case under discussion, the witness, Wm. Carr, was asked if he did not tell one Mary Bray, that if she would testify, that he would see that she was paid. Wm. Carr was a witness. What

better evidence could there be that he was biased and corrupt, and that his testimony should be discredited?

Wigmore, in § 1005, has this to say about bias: "Particular circumstances and expressions, indicating bias, are provable by extrinsic testimony; they are therefore also provable in contradiction."

As I said, the elucidation of truth is one of the prime objects of all rules of evidence. What would any man of common sense think of a rule of law that would not permit a party to a suit to prove that a witness against him was bribed, or that would deny a party the right to ask that witness, upon cross-examination, had he not been bribed, and if he denied it, to put witness on the stand to prove the falseness of his statement, that he had not been bribed. And yet if the rule laid down in Langhorne's case, following Wharton on Evidence, is correct, it could not be done, because that fact could not be proved as a part of the plea. Suppose the suit was on a verbal contract; the plaintiff would prove his case, the defendant would prove his side, and then suppose the plaintiff offered to prove in rebuttal that one of the defendant's witnesses had been bribed, or suppose he had, upon cross-examination, asked the witness had he not been bribed, and then had attempted to prove in rebuttal, that the witness had been bribed by a man who heard him say he had been bribed.

If Wharton is right, and the Court of Appeals following him is right. then it could not be proved that the witness was bribed, because it could not have been proved as a part of the case in chief of the plaintiff.

The matter is absurd. It is not law as is shown by the extracts from Wigmore, and it is not common sense. It would be a disgrace to the administration of justice of an African chief.

The only difference from the case under discussion is that the witness, Wm. Carr, was asked if he did not attempt to bribe a witness.

What better evidence is wanted to show the bias of a witness, than the fact that he was attempting to bribe another witness. And yet we are gravely told, that if he denies it, it cannot be proved on him.

I can add nothing to the simple statement of the case. I cannot believe it is law, and I must believe that the Court of Appeals will reverse themselves, when their attention is sharply called to it. If they do not, the Legislature had better go to work on it.

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